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17 **IN THE UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA

18 MARLON H. CRYER, individually and) Case No. 4:16-cv-4265-CW
19 as representative of a class of) (**lead case consolidated with**)
20 similarly situated persons,) Case No. 3:17-cv-6409-CW

21 Plaintiffs,) **PLAINTIFFS' MEMORANDUM**
22) **IN FURTHER SUPPORT OF**
23 v.) **MOTION FOR PRELIMINARY**
24 FRANKLIN RESOURCES, INC., et al.,) **APPROVAL OF SETTLEMENT**

25 Defendants.) Hearing Date: Hon. Claudia Wilkens
26) Time: Courtroom: 2, 4th Floor

1 Plaintiffs' Memorandum in Further Support of Preliminary Approval

2 **I. The Plan of Allocation Equitably Distributes Relief Between Class
3 Members.**

4 The plan of allocation is the best practical means of providing relief to the
5 Class. It is equitable to all class members, given that Active Participants,
6 Inactive Participants, and Former Participants are *all* entitled to an Adjusted
7 Allocation under the Plan (which is calculated by determining each Class
8 Member's Pro Rata Percentage of the Distributable Settlement Amount, and
9 then adjusting the totals to ensure that no Class Member receives less than
10 \$10). Active Participants will receive their Adjusted Allocation first through the
11 Increased Match, but the parties have agreed to hold back a portion of the
12 Distributable Settlement Amount to ensure that Active Participants actually
13 receive the Adjusted Allocation to which they are entitled, even if they (i) leave
14 Franklin before they receive that amount through the Increased Match; or
15 (ii) remain at Franklin but choose not to defer enough compensation into their
16 Plan account to receive their Adjusted Allocation through the Increased Match.
17 While the mechanism for compensating active employee class members through
18 an enhanced match *also* provides an *opportunity* for certain active Franklin
19 employees to receive Increased Match contributions beyond their Adjusted
20 Allocation, those benefits only come through *additional* contributions by those
21 employees and *additional* matching contributions by Franklin, not by a
22 reduction in benefits to other class members. These additional matching
23 contributions are contingent on active employees meeting three conditions that
24 do not apply to former or inactive employees: (1) continuing to work for
25 Franklin; (2) continuing to defer compensation into the Plan; and (3) deferring
26 compensation at a rate that is higher than the contributions required to receive
27 their settlement benefit. Unless these conditions are met, those current
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1 employees will not receive more than the amount assumed by the settlement
 2 and Franklin will not pay more than the assumed amount of the matching
 3 contributions. Thus, the possibility of a higher benefit is, in a real way, not a
 4 feature of the settlement at all, but merely a beneficial consequence of a
 5 combination of the settlement itself and current employees' choosing to continue
 6 to work for Franklin and defer into the Plan.

7 There are myriad settled cases that feature both a monetary payout to the
 8 entire class and prospective relief benefitting only those class members (and
 9 non-class members) who have and continue to have a relationship with the
 10 Defendant. *See, e.g., Kanawi v. Bechtel Corp.*, No. 06-5566; 2011 WL 782244
 11 (N.D. Cal. Mar. 1, 2011) (noting ERISA settlement included “potentially
 12 significant non-monetary relief”, which would only benefit current and future
 13 plan participants); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15 (N.D. Cal.
 14 1980) (approving over objections a settlement providing for cash payments and
 15 “extensive” prospective relief). The Increased Match is just such a benefit. This
 16 settlement also includes another prospective benefit, *i.e.*, the requirement that
 17 Franklin add non-proprietary target date funds, which will benefit the current
 18 and future Plan participants above and beyond the money paid by Franklin.

19 In light of the above, the Plan of Allocation for distributing the settlement
 20 proceeds is equitable.

21 **II. The parties have agreed upon revisions to the Proposed Preliminary
 22 Approval Order and Class Notices in Response to the Court’s Concerns.**

23 Plaintiffs attach hereto as Exhibit A the revised Proposed Preliminary
 24 Approval Order, reflecting dates matching those requested by the Court.
 25 Specifically, deadlines are measured in calendar days divisible by seven and
 26 provide sufficient time for Class Members to review the provided material and

1 submit any objections. In addition, Exhibit A also revises the section on the
2 Court's retention of jurisdiction over this matter, as requested by the Court.

3 Plaintiffs attach hereto as Exhibits B and C two revised alternative
4 versions of the Class Notice for the Court's consideration. Exhibit B includes
5 additional text intended to give Class Members more detailed information on
6 the key inputs to a Class Member's recovery under the Plan of Allocation—in
7 other words, to describe to them the formula for allocating settlement benefits—
8 and to explain to Class Members that, once the Distributable Settlement
9 Amount is determined, their respective settlement allocations will primarily be
10 driven by two factors: (1) the number of years during the Class Period in which
11 they had year-end account balances, and (2) the amount of each of those year-
12 end account balances. That additional text reads as follows:

13 On a summary level, the Plan of Allocation will work as follows: The
14 Settlement Administrator will determine the Distributable Settlement
15 Amount to be allocated to Class Members. The Settlement
16 Administrator will then calculate the portion of the Distributable
17 Settlement Amount to be allocated to each Class Member, based on that
18 Class Member's year-end account balance for each year from 2010
19 through 2018. Thus, a Class Member's allocation will depend on both
20 the amount he or she maintained in the Plan over the Class Period and
21 the number of years during the Class Period in which the Class Member
22 maintained a balance. To ensure that no Class Member receives less
23 than \$10, any Class Member entitled to receive less than \$10 will be
24 allocated \$10, and the remaining allocations will be adjusted
25 proportionally.

26 (Ex. B at 4.)
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1 At the Preliminary Approval Hearing, the Court asked the parties to
2 consider whether the Class Notice should also include hypotheticals to illustrate
3 potential settlement allocations for Class Members. Although the precise
4 recovery cannot be calculated, Plaintiffs believe Exhibit C, a second proposed
5 revised version of the Class Notice, presents a reasonable estimate. It includes
6 the additional text described above, as well as the following paragraph laying
7 out three hypothetical scenarios:

8 The following hypotheticals illustrate how the Plan of Allocation is
9 designed to work. It is important to stress that these hypotheticals have
10 been calculated using preliminary estimates of (i) the dollar amount to
11 be distributed to Class Members, (ii) the number of Class Members, and
12 (iii) the Class Members' Plan account data over only a portion of the
13 Class Period (through 2017). The final allocations will depend on the
14 final figures for each of those three factors, which will not be known until
15 later in the settlement administration process. That said, based on these
16 preliminary numbers:

- 17 • Hypothetical Participant A, who had an average yearly Plan
18 balance of \$100,000 and was in the Plan for four years of the Class
19 Period, may recover approximately \$1,000.
- 20 • Hypothetical Participant B, who had the same average yearly
21 balance of \$100,000, but was in the Plan for just two years of the
22 Class Period, may recover approximately \$500. (That is because,
23 all things being equal, a Class Member who participated in the
24 Plan for longer will get a larger allocation.)
- 25 • Hypothetical Participant C, who had an average yearly Plan
26 balance of \$200,000 (double the average yearly balance of
27 Hypothetical Participant A), but was in the Plan for the same four

1 years as Hypothetical Participant A, may recover approximately
2 \$2,000. (That is because, all things being equal, a participant
3 with a higher yearly Plan balances will get a larger allocation.)

4 (Ex. C at 4.)

5 Both versions of the revised Class Notice also contain the following
6 additional language:

7 Actual allocation amounts will depend on the final Distributable
8 Settlement Amount and the Class Member's aggregate yearly
9 account balances and number of years in the Plan during the Class
10 Period, and it is possible that some Class Members may receive the
11 minimum recovery of \$10.

12 (Ex. B at 4, Ex. C at 5.)

13 Defendants are concerned that the hypotheticals included in Exhibit C
14 may be misinterpreted by Class Members, causing them to form a belief that
15 their recovery will be higher or lower than it may actually be given their
16 individual Plan experience, or that their calculation can be identified with
17 certainty at this stage, when none of the inputs for the Plan of Allocation
18 formula can be stated with any precision at this time. First, the Distributable
19 Settlement Amount has yet to be fixed. It will depend on a number of factors,
20 including the amount of attorneys' fees and expenses awarded by the Court to
21 Class Counsel at the Final Approval Hearing. Second, the number of Class
22 Members is not known at this time, as the list of Class Members will be
23 compiled following preliminary approval. Third, and relatedly, the Class
24 Members' Plan account data (i.e., their year-end Plan account balances over the
25 Class Period), has not yet been collected for the full Class Period, as it too will be
26 compiled fully only following any preliminary approval. The hypotheticals thus
27 do not give Class Members the ability to calculate their own estimated recovery

1 amounts at this stage in the proceedings (i.e., before the number of Class
 2 Members and the total Distributable Settlement Amount are fixed, and before
 3 the Class Members' participant data is collected for purposes of running the
 4 Plan of Allocation).

5 Defendants thus request that the Court approve the revised Class Notice
 6 attached as Exhibit B. That version provides enhanced information regarding
 7 the Plan of Allocation and the factors that will affect an individual Class
 8 Member's recovery. This is more detailed than notices approved in other
 9 comparable cases—including, for example, the notice approved by Judge Breyer
 10 in *Kanawi v. Bechtel Corp.*, No. 06-5566, Doc. 794-2 at ECF p. 59–64 (N.D. Cal.
 11 Oct. 12, 2010) (attached hereto as Exhibit D). The parties agree that the Court
 12 may select either version for distribution to the Class.

13 **III. The Independent Fiduciary**

14 The Independent Fiduciary is Fiduciary Counselors, Inc. As a term of the
 15 Settlement, its fee of \$15,000, plus any reasonable out-of-pocket expenses, will
 16 be paid from the settlement fund.

17 **IV. Settlement Release**

18 The definition of “Released Claims” in Section 1.36 of the Settlement
 19 Agreement encompasses claims “arising out of or in any way related to” (a) the
 20 conduct alleged in the *Cryer* and *Fernandez* operative Complaints, whether or
 21 not included as counts in the Complaints; (b) the selection, retention and
 22 monitoring of the Plan’s investment options and service providers; (c) the
 23 performance, fees and other characteristics of the Plan’s investment options; (d)
 24 the Plan’s fees and expenses, including without limitation, its recordkeeping
 25 fees; (e) the nomination, appointment, retention, monitoring and removal of the
 26 Plan’s fiduciaries; and (f) the approval by the Independent Fiduciary of the
 27 Settlement, with certain exceptions described in Section 1.36. At the

1 Preliminary Approval Hearing, the Court inquired whether the phrase “in any
 2 way related to” should be revised to read “related to.” The phrase “in any way” is
 3 frequently used in defining the scope of released claims,¹ and is expressly tied to
 4 the specific subjects that follow the phrase (which mitigates any overbreadth
 5 concerns). Defendants thus respectfully decline to revise the language of Section
 6 1.36, which was negotiated carefully and deliberately over the course of the
 7 parties’ multi-week negotiation of the Settlement Agreement.

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9 Dated: May 17, 2019

Respectfully submitted,

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¹ See, e.g., *In re Volkswagen “Clean Diesel” Mktg. Sale Practices, and Products Liab. Litig.*, 2672 CRB (JSC), 2017 WL 672820, at *4 (N.D. Cal. Feb. 16, 2017) (Finding release covering claims “in any way related to” the allegations “is consistent with Ninth Circuit law”); *Ferrari v. Autobahn, Inc.*, 17-cv-18 (YGR), 2019 WL 295260, at *17 (N.D. Cal. Jan. 23, 2019) (granting final approval where release included claims “in any way related” to the allegations); *McLeod v. Bank of Am., N.A.*, 16-cv-3294 (EMC), 2018 WL 5982863, at *7 (N.D. Cal. Nov. 14, 2018) (granting preliminary approval where release included claims “in any way related” to the allegations).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of May, 2019, a true and correct copy of the foregoing was filed with the Court using the CM/ECF system and service upon all participants in this case who are CM/ECF users will be accomplished by operation of that system.

/s/ Gregory Y. Porter